

No. 77406-4

SUPREME COURT OF THE STATE OF WASHINGTON

**DOUG SCOTT, LOREN TABASINKE, SANDRA TABASINSKE,
PATRICK OISHI, JANET OISHI, et al.,**

Petitioners,

v.

CINGULAR WIRELESS,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES

F. Paul Bland, Jr.
(admitted pro hac vice)
Trial Lawyers for Public Justice
1717 Massachusetts Ave., NW
Suite 800
Washington, D.C. 20036-2001
(202) 797-8600

Douglas S. Dunham, WSBA No. 2676
Stephen J. Crane, WSBA No. 4932
Crane Dunham, PLLC
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
(206) 292-9090

Leslie A. Bailey
(admitted pro hac vice)
Trial Lawyers for Public Justice
555 Twelfth Street, Suite 1620
Oakland, CA 94607-3616
(510) 622-8150

Steve Rosen, WSBA No. 26034
Law Offices of Steve Rosen
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
(206) 333-3633

Attorneys for Petitioners

STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Petitioners submit this statement of additional authorities to provide the Court with the recent decision in *Riensch v. Cingular Wireless LLC*, No. 06-1325Z, 2006 WL 3827477 (W.D. Wash. Dec. 27, 2006), which held that the class action ban embedded in Cingular's arbitration clause is substantively unconscionable under Washington law.

First, the *Riensch* court held that the FAA does not preempt the application of generally-applicable state unconscionability law to arbitration clauses. 2006 WL 3827477 at *4–5. This holding is relevant to Petitioners' argument that the FAA would not preempt a finding by this Court that the class action ban embedded in Cingular's arbitration clause is unconscionable under state law. Opening Br. at 30–39; Reply Br. at 22–25; Mot. for Disc. Rev. at 17–19.

Second, the *Riensch* court held that, under Washington law, a contract is unenforceable if it is substantively unconscionable, regardless of whether the contract is also procedurally unconscionable. 2006 WL 3827477 at *5. This holding is relevant to Petitioners' position on this point. Opening Br. at 10–11.

Third, the *Riensch* court held that the class action ban in Cingular's arbitration clause is substantively unconscionable under

Washington law. 2006 WL 3827477 at *12. The court stated that “the class action prohibition is a one-sided provision that benefits only Cingular” and that it “effectively prevents consumers from seeking redress whenever the monetary value of the claim is so small that it is not worth the time or money to pursue in small claims court or arbitration, while allowing Cingular to allegedly cheat large numbers of consumers out of individually small sums of money.” *Id.* (internal quotations omitted). That holding is relevant to Petitioners’ argument in this case that Cingular’s class action ban is substantively unconscionable under Washington law. Opening Br. at 19–29; Reply Br. at 6–8; Mot. for Disc. Rev. at 6–10; Reply in Support of Disc. Rev. at 6–9; Supp. Br. at 8–13.

Respectfully submitted this 11th January, 2007.

**FILED AS ATTACHMENT
TO E-MAIL**

F. Paul Bland, Jr. (admitted pro hac vice)
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036-2001

Leslie A. Bailey (admitted pro hac vice)
Trial Lawyers for Public Justice
555 Twelfth Street, Suite 1620
Oakland, CA 94607-3616

Douglas S. Dunham, WSBA No. 2676
Stephen J. Crane, WSBA No. 4932
Crane Dunham, PLLC
800 Fifth Avenue, Suite 4000
Seattle, WA 98104

Steve Rosen, WSBA No. 26034
Law Offices of Steve Rosen
800 Fifth Avenue, Suite 4000
Seattle, WA 98104

Briefs and Other Related Documents

Riensch v. Cingular Wireless, LLC W.D.Wash., 2006. Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Seattle.

Nathan RIENSCH, individually and on behalf of all
 the members of the class of persons similarly
 situated, Plaintiffs,

v.

CINGULAR WIRELESS LLC, a Delaware limited
 liability company, d/b/a Cingular Wireless, New
 Cingular Wireless Services, Inc., a Delaware
 corporation, d/b/a AT & T Wireless, New Cingular,
 Wireless Services Purchasing Company, L.P., a
 Delaware limited partnership, d/b/a Cingular
 Wireless, and New Cingular Wireless PCS, LLC, a
 Delaware limited liability company, d/b/a Cingular
 Wireless, Defendants.

No. C06-1325Z.

Dec. 27, 2006.

David Elliot Breskin, John B. Crosetto, Short
 Cressman & Burgess, Seattle, WA, for Plaintiffs.
Kelly Twiss Noonan, Pallavi Mehta Wahi, Scott
A.W. Johnson, Shelley Hall, Stokes Lawrence,
 Seattle, WA, for Defendants.

ORDER

THOMAS S. ZILLY, United States District Judge.

Background

*1 Plaintiff Nathan Riensch filed a class action against Cingular Wireless, LLC ("Cingular") alleging breach of contract and violation of the Washington Consumer Protection Act, RCW 19.86 et seq., ("CPA") for failure to disclose, charging and collecting a Business and Occupation Tax Surcharge to its wireless customers. Compl., docket no. 1.

Mr. Riensch became a Cingular wireless customer in 2004. Bennett Decl., docket no. 6, ¶ 3. He activated his service through Cingular's online e-store. *Id.* See also Riensch Decl., docket no. 14, ¶ 3. Before proceeding to checkout, Mr. Riensch was presented with Terms of Service ^{FN1} ("Terms"). *Id.* He did not read the Terms. Riensch Decl., ¶ 3.

However, he was required to indicate his agreement to the Terms before proceeding to checkout. Bennett Decl., ¶ 3. As a standard custom, Cingular mails all new customers a Welcome Kit, including a copy of the Terms, which contains an arbitration provision. *Id.*, ¶ 5, Ex. A.

^{FN1}. The Terms presented in the online store were the same, or substantially the same, as those Mr. Riensch received in his Welcome Kit. Bennett Decl., ¶ 3.

Mr. Riensch upgraded his service through Cingular's online store on July 17, 2006. Bennett Decl., ¶ 6, Ex. B. In the process of completing the upgrade, he had to indicate that he accepted the Terms, and was sent a new Welcome Kit containing a copy of the Terms. *Id.* Mr. Riensch says he does not recall receiving a copy of his "service agreement" when he received his phone and manual, neither in 2004 nor in 2006. Riensch Decl., ¶¶ 4-5. However, Mr. Crosetto has submitted an excerpt from Mr. Riensch's 2006 Welcome Kit, Crosetto Decl., docket no. 13, ¶ 8. Cingular has submitted evidence that the terms of service were also included in that Welcome Kit. Bennett Decl., Ex. B.

Defendant Cingular now brings this Motion to Compel Arbitration, docket no. 5.

Analysis

The Federal Arbitration Act ("FAA"), 9 U.S.C. § § 1-16, provides that an arbitration provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This section of the FAA is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, district courts must compel arbitration where a valid agreement to arbitrate exists. See *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000). The party resisting arbitration has the burden of proving that the arbitration agreement is unenforceable. See *Green Tree Fin. Corp. v.*

Randolph, 531 U.S. 79, 91-92 (2000).

State law governs questions of validity and enforceability of an arbitration agreement. Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987); Tricknor v. Choice Hotels, Intern., Inc., 265 F.3d 931, 936-37 (9th Cir.2001). Washington law also favors enforcement of arbitration agreements. Adler v. Fred Lind Manor, 153 Wn.2d 331, 341 n. 4 (2004). On appeal, a district court's denial of a motion to compel arbitration is reviewed de novo. Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1257 (9th Cir.2005).

A. Lack of Agreement

*2 Mr. Riensche contends that he did not enter an agreement to arbitrate with Cingular because (1) he did not read the agreement online, and he does not recall receiving the agreement in the mail; and (2) he thought the arbitration agreement was unconscionable and unenforceable, based on his involvement in a prior lawsuit against AT & T Wireless Services ("AWS"), which was purchased by Cingular. See Schnall v. AT & T Wireless Services, Inc., KCSC No. 02-2-05776-4 (August 15, 2003), Noonan Decl., docket no. 7, Ex. D (ruling that AT & T's arbitration agreement was unconscionable and unenforceable).

Although Mr. Riensche claims he did not intend to enter into an arbitration agreement, he does not specifically deny that he agreed to Cingular's Terms. Cingular submits evidence that Mr. Riensche was required to agree to the Terms online on two separate occasions, and that Mr. Riensche was mailed a copy of the Terms following each of those transactions. Bennett Decl., ¶¶ 3-6. Mr. Riensche is incorrect that his decision not to read the Terms absolves him from any obligation to be bound by those Terms. See Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 799 (2003) (parties are bound to the contracts they sign, regardless of whether they have actually read or understood them). Furthermore, Mr. Riensche does not deny that he received a copy of the Terms by mail, but rather that he does not recall receiving one. Under Washington law, evidence that a copy of the Terms is mailed to all customers is business custom evidence that is "admissible and relevant to prove or disprove the existence of a contract." Lowden v. T-Mobile, 2006 WL 1009279 at *3 (April 13, 2006) (citing Industrial Electric-Seattle, Inc. v. Bosko, 67 Wn.2d 783, 797 (1966)) (evidence that signed agreements are required before service will be provided is evidence of the existence of a contract).

Finally, Mr. Riensche contends that he believed the agreement to arbitrate was unenforceable, based on a ruling that a previous agreement he had with AT & T Wireless, Inc. was unenforceable in Schnall. However, Mr. Riensche admits he did not read his new arbitration agreement when he renewed his contract with Cingular in 2004 and 2006, and thus has no basis for his contention that he believed it was unenforceable. Therefore, Mr. Riensche is bound by the provisions of the arbitration agreement to the extent the agreement is enforceable.

B. Waiver

Mr. Riensche contends that Cingular has waived its right to arbitrate by removing this case to federal court. Pl.'s Resp., docket no. 12, at 6. He argues that removal constitutes forum shopping and that Cingular has prejudiced him by delaying the adjudication of his claims. *Id.* A party waives its right to arbitrate when (1) the party knows of its right to arbitrate; (2) the party acts inconsistently with that right; and (3) another party is prejudiced by those inconsistent acts. Adler v. Fred Lind Manor, 153 Wn.2d 331, 362 (2004); 9 U.S.C. § 1-16. In Adler, the Washington Supreme Court held that the defendant had not waived its right to arbitrate when it first attempted to resolve the dispute through mediation, and then filed a motion to arbitrate promptly after filing its answer to the complaint. 153 Wn.2d at 362.

*3 Cingular promptly filed its Motion to Compel Arbitration on September 21, 2006, seven days after the removal of this case. Cingular has not acted inconsistently with its right to arbitrate and removal has not prejudiced Mr. Riensche. See Adler, 153 Wn.2d at 362; United Computer Systems, Inc. v. AT & T Corp., 298 F.3d 756, 765 (9th Cir.2002). Therefore, the Court concludes that Cingular has not waived its right to arbitrate.

C. Legal Effect of Parrish v. Cingular Wireless, LLC

The California Court of Appeal has held a materially identical arbitration agreement unenforceable under California law. Parrish v. Cingular Wireless, LLC, 2005 WL 2420719, No. A105518 (Cal.App. October 03, 2005), cert denied, 126 S.Ct. 2353 (2006). Parrish held the arbitration agreement unconscionable because its class action waiver

operated as an exculpatory clause under California law. *Id.* at *6 (citing *Discover Bank v. Superior Court*, 30 Cal.Rptr.3d 76, 89 (2005)). Mr. Riensche argues that his materially identical agreement to arbitrate with Cingular cannot be enforced in light of *Parrish*.

1) "Null and Void" Clause

Mr. Riensche argues that, following *Parrish*, the arbitration provision is "null and void" on its own terms. Pl.'s Resp. at 11. The provision here, as in *Parrish*, requires the consumer to agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

Crosetto Decl. at 24 (emphasis added). Mr. Riensche argues that this clause is not limited to situations where the waiver is unenforceable as to him specifically, or even a particular jurisdiction. Pl.'s Resp. at 11-12. Rather, he argues, the clause acts to nullify all materially identical agreements in all jurisdictions, once the "specific proviso" is held unenforceable by any court. *Id.* He compares Cingular's use of the phrase "this specific proviso [waiving class actions]" with T-Mobile's use of "your waiver of your ability to pursue class or representative claims," arguing that T-Mobile's agreement limits the invalidating effect to individual consumers, while Cingular's does not. *Id.*

Cingular's view is that "[t]he provision is intended to void the arbitration provision if the class action waiver provision, as applied to Mr. Riensche, is held to be unenforceable." Def.'s Reply, docket no. 15, at 5. The Court agrees. There is nothing in the agreement showing that the parties intended this provision to do anything other than preclude severance of the class action prohibition from the arbitration clause. Therefore, the Court concludes that *Parrish* does not render the agreement between Mr. Riensche and Cingular "null and void".

2) Collateral Estoppel

*4 Mr. Riensche contends that Cingular is collaterally estopped from enforcing its arbitration agreement because the *Parrish* court held a

materially identical agreement unenforceable. Pl.'s Resp. at 14. Cingular argues that collateral estoppel does not apply, because the issue in *Parrish* was not identical to the issue in this case.^{FN2} Def.'s Reply at 4-5. To assert collateral estoppel, Mr. Riensche must prove the following four elements:

^{FN2} Cingular is incorrect that this Court's enforcement of the arbitration agreement as to some claims in *Peck v. Cingular Wireless, LLC*, No. 06-00343, "undercuts Mr. Riensche's argument." Def.'s Reply at 4 n. 6. The facts in *Peck* differed significantly from the facts of the present case. Mr. Peck was a former employee of Cingular, and only the arbitration agreement relating to claims arising under Mr. Peck's employee calling plan was enforced. Minute Order, *Peck v. Cingular Wireless, LLC*, No. 06-00343, docket no. 21 (June 12, 2006).

(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Nielsen v. Spanaway General Medical Clinic, Inc., 135 Wn.2d 255, 263 (1998). Because Mr. Riensche cannot prove the first element, he cannot assert collateral estoppel.

The issue in *Parrish* is not identical, because *Parrish* applied California contract law in finding the provision unconscionable. Washington law concerning the unconscionability of contracts differs from that of California.^{FN3} See *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 1166, 1174 (2002). Washington law concerning the unconscionability of arbitration agreements containing a class action waiver is currently unsettled.^{FN4} Even if the substantive law were the same, the "context rule" requires that a court consider the circumstances of an individual arbitration agreement in interpreting its terms, and such a contextual analysis is necessary to determine whether or not an agreement is unconscionable. See *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351 (2004); *Tjart v. Smith Barney, Inc.*, 107 Wn.App 885, 895 (2001).

^{FN3} Mr. Riensche argues that the Ninth Circuit has found that California and

Washington definitions of substantive unconscionability are the same such that a contract clause found unconscionable as a matter of law under California law is also unconscionable under Washington law. See Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1261 (9th Cir.2005) (citing California, federal, and Washington cases in holding that an arbitration agreement in an employment contract was substantively unconscionable under Washington law). This is incorrect. Although Washington and California courts define substantive unconscionability in the same fashion, they are not bound to the same interpretation of that definition.

FN4. Cingular notes three King County superior court cases that have enforced agreements similar to Cingular's. Udlinek v. AT & T Wireless Servs., Inc., No. 04-2-04745-5 (June 9, 2004); Scott v. Cingular Wireless No. 04-2-04205 (Sept. 10, 2004); Drake v. AT & T Corp., No. 04-2-36050-1 (Sept. 8, 2005). The Washington Supreme Court is currently deciding whether arbitration agreements containing a class action waiver are *per se* unconscionable. Scott v. Cingular Wireless, No. 77406-4 (Oral Argument heard on Feb. 28, 2006).

Therefore, the Court concludes that collateral estoppel does not apply, because the applicable law and the circumstances surrounding the agreement in *Parrish* differed from those in the present case.

D. Federal Preemption

Cingular argues that any ruling by this Court "finding that Cingular's arbitration provision must allow for class-wide arbitration to be enforceable would be preempted by the FAA, both because Section 2 of the FAA would expressly preempt such a ruling and because it would be in conflict with the FAA." Def.'s Mot. to Compel, docket no. 5, at 12. Cingular relies on case law that does not support its argument.^{FN5} In fact, the authorities Cingular cites show that unconscionability is a traditional common-law defense that is applicable to all contracts and not in conflict with the FAA.

FN5. Cingular correctly points out that Mr. Riensche fails to meaningfully respond to its

preemption argument. Def.'s Reply at 12. However, Cingular's argument that the FAA preempts state law governing unconscionability is clearly erroneous.

It is well-settled that the FAA does not preempt general principles of state contract law. "[Arbitration] clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" Southland Corp. v. Keating, 465 U.S. 1, 17 (1984). "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). "Despite the 'liberal federal policy favoring arbitration agreements,' state law is not entirely displaced from federal arbitration analysis." Tricknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 936-37 (9th Cir.2001) (quoting Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 81 (2000)).

*5 The Ninth Circuit has repeatedly rejected the argument that the FAA preempts rulings that refuse to enforce unconscionable arbitration clauses.^{FN6} See, e.g., Ting v. AT & T, 319 F.3d 1126 (9th Cir.2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir.2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir.2002); Bradley v. Harris Research, 275 F.3d 884, 889-90 (9th Cir.2001).

FN6. Cingular's reliance on Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC, 379 F.3d 159, 167 (5th Cir.2004), is likewise unpersuasive. *Iberia* discusses at length the applicability of state law contract principles to arbitration agreements, emphasizing that courts "must exercise care in enforcing state doctrines of unconscionability to invalidate arbitration clauses." *Id.* at 170. *Iberia* applied governing state cases regarding the unconscionability of arbitration agreements, noting that these cases did not "single out arbitration clauses for especially strict scrutiny." *Id.*

Cingular contends that the Court may not consider the consumer nature of the agreement in determining whether the arbitration agreement is unconscionable. The Ninth Circuit has held that the FAA preempts state laws that apply uniquely to other types of contracts, in addition to laws that apply uniquely to arbitration agreements. Bradley v. Harris Research, 275 F.3d 884, 889-90 (9th Cir.2001) (holding that a

state law that applied only to forum selection clauses and franchise agreements was preempted by the FAA); *Ting v. AT & T*, 319 F.3d 1126, 1148-49 (9th Cir.2003) (holding that a state consumer protection statute that would bar class-actions was preempted by the FAA because it applied only to consumer contracts).

However, *Bradley* specifically noted that *unconscionability* is a “generally applicable contract defense” that is not preempted by the FAA. 275 F.3d at 890 n. 7. Similarly, *Ting* held that the application of the state law principle of unconscionability was not preempted by the FAA, ultimately holding that the arbitration agreement at issue was unconscionable. 319 F.3d at 1147-52. Because the Court must consider the totality of the circumstances, *Luna*, 236 F.Supp. at 1183, and whether the contract limits remedies available to consumers, *Ting*, 275 F.3d at 1149-52, the Court may consider the consumer nature of the agreement without invoking the preemptive effect of the FAA.^{FN7}

FN7. Cingular also implies that the court may not invalidate the arbitration agreement while enforcing the remainder of the contract. Def.'s Mot. to Compel at 6. Cingular relies on a quotation from *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995), which Cingular has taken out of context:

States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.

513 U.S. at 281 (emphasis on sentence omitted by Defendant Cingular). When read in context, these words stand for the principle that courts may invalidate an arbitration clause where there are grounds to do so, and may not invalidate one simply because it is an arbitration agreement. Absent intent to the contrary, unenforceable arbitration clauses are severable. *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1248 (9th Cir.1994).

E. Enforceability of the Arbitration Agreement

The Court now considers whether the arbitration agreement between Mr. Riensche and Cingular is valid and enforceable. Under Washington law, a contract is unenforceable if it is substantively unconscionable, even if it is procedurally conscionable. See *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346-47. Some courts have held that a finding of either procedural or substantive unconscionability is sufficient to render a contract unenforceable. See *Tjart v. Smith Barney, Inc.*, 107 Wash.App. 885, 898 (2001) (recognizing that a contract may be unenforceable based on procedural unconscionability only).

1) Procedural Unconscionability

Under Washington law, an arbitration agreement is procedurally unconscionable if one party lacked meaningful choice in entering the contract. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 303-304 (2004). In determining whether there was meaningful choice, courts consider “all the circumstances surrounding the transaction,” including (1) “[t]he manner in which the contract was entered,” (2) “whether each party ... [had] a reasonable opportunity to understand the terms of the contract,” and (3) whether “the important terms [were] hidden in a maze of fine print.” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (1965), cited with approval in *Zuver*, 153 Wn.2d at 303-304; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345 (2004); *Nelson v. McGoldrick*, 127 Wn.2d 124, 131 (1995); *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260 (1975); *Lowden v. T-Mobile*, 2006 WL 1009279 at *4. These three factors should not be applied mechanically without regard to whether meaningful choice actually existed. *Zuver*, 153 Wn.2d at 760 (quoting *Schroeder*, 86 Wn.2d at 260). The Court now considers each of these factors to determine whether meaningful choice existed under the circumstances of this case.

a. Manner in Which the Contract was Entered

*6 The agreement between Mr. Riensche and Cingular was a contract of adhesion, because it was a standard form contract prepared by Cingular and offered to customers, who were required to accept it on a “take it or leave it” basis. See *Zuver*, 153 Wn.2d at 304. While weighing in favor of finding procedural unconscionability, the fact that the agreement is an adhesion contract does not, by itself, render it

procedurally unconscionable. *Id.* (citing *Yakima Fire Prot. Dist.*, 122 Wn.2d 371, 393 (1971)). See also *Adler*, 153 Wn.2d at 348; *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn.App.354, 362 (2004); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 459 (2002); *Luna v. Household Fin. Corp.*, 236 F.Supp.2d 1166, 1175 (W.D.Wash.2002).

Mr. Riensche contends that he lacked meaningful choice because, “as the *Parrish* court found, ‘there are no meaningful alternatives available’ for consumers.” Pl.’s Resp. at 17 (quoting *Parrish*, 2005 WL 2420719 at *5). If no meaningful alternatives were present in the market, that could weigh against a finding that Mr. Riensche had a meaningful choice. However, Cingular submits evidence showing that some wireless carriers may not require customers to arbitrate or to waive class proceedings. Noonan Decl., Exs. E, F. Furthermore, Mr. Riensche fails to cite, and the Court is not aware of, Washington legal authority discussing the legal effect of a lack of market alternatives in determining procedural unconscionability.

Mr. Riensche contends that he lacked meaningful choice because he had to enter personal information into a form on Cingular’s website before the Terms were presented to him. Pl.’s Resp. at 3. However, the terms were presented to Mr. Riensche at a point when he still had an option whether or not to complete his transaction. Therefore, the Court concludes that the presentation of the terms after he entered some personal information, but before he agreed to complete the transaction, did not deprive Mr. Riensche of meaningful choice.

b. Reasonable Opportunity to Understand the Terms

Mr. Riensche suggests that the agreement is procedurally unconscionable based on a time-out feature on Cingular’s website, which causes the website to expire, requiring the customer to re-type his personal information, if there is no computer activity for 15 minutes. Pl.’s Resp. at 3. However, Mr. Riensche submits no evidence showing that he felt pressured into agreeing to something he did not understand based on the time-out feature. As Cingular points out, a customer may take as long as he wishes to review the agreement, then re-enter his personal information at a later time.

Furthermore, if Mr. Riensche realized that he no longer agreed with the terms after he had placed his

order, he could have cancelled his service. The 2004 Welcome Kit notifies the customer of a 15-day return policy in the event he does not accept the terms and conditions, Bennett Decl., Ex. A at 12, and the 2006 Welcome Kit describes a 30 Day Cancellation Policy, *id.*, Ex. B at 31, which allows customers to cancel without paying the early termination fee.

*7 Next, Mr. Riensche contends that he lacked meaningful choice because the agreement was “incomprehensible.” Pl.’s Resp. at 17. Near the top of the contract, it says, “This Agreement requires the use of arbitration to resolve disputes and also limits the remedies available to you in the event of a dispute.” Crosetto Decl. at 22. On the third page of the print-out version, the text reads, “ARBITRATION Please read this carefully. It affects your rights.” *Id.* 24. The agreement informs the customer of the option for either party to pursue a claim in small claims court. *Id.* The agreement gives the web address for the American Arbitration Association (“AAA”), if the customer wants information about the arbitration rules. *Id.* The agreement clearly indicates that the customer will be required to arbitrate, and Mr. Riensche was allowed an unlimited time period in which he could have consulted counsel or otherwise clarified the meaning of the terms.

Mr. Riensche had a reasonable amount of time to review the terms of the agreement. He had an option to cancel his service without paying an early termination fee, if he decided he did not agree with the terms after receiving his phone and Welcome Kit. The terms of the agreement clearly require arbitration of disputes. Therefore, the Court concludes that Mr. Riensche had a reasonable opportunity to understand the terms of the agreement.

c. “Maze of Fine Print”

Mr. Riensche contends that the agreement is procedurally unconscionable because the terms are presented in “a four-page solid block of text in fine print with no paragraph or other section breaks.” Pl.’s Resp. at 3. See Crosetto Decl. at 22-25. He also suggests that the font used was difficult to read and “a signal to the average viewer that the content is not necessary to read.” *Id.* at 3 n. 2.

The consumer is given the option of reading the terms and conditions online, or printing them out. See Crosetto Decl. at 17, 22-25. Online, the terms are presented in Courier font, in a window that requires

the reader to scroll down to read more than the first few lines of the agreement. *See id.* at 17. The arbitration notice and arbitration provision are not visible without scrolling down. *Id.* The “printable” version is in a sans serif font and prints onto four pages, without section breaks. Crosetto Decl. at 22-25. In either case, all the terms, including the arbitration provision, are typed in the same size, legible font.

Following his online transactions, Mr. Riensche was provided with another copy of the arbitration agreement in his 2004 and 2006 Welcome Kits. In the 2004 Welcome Kit, the terms were presented in a two-page block of small text. Bennett Decl., Ex. A at 11. The arbitration provision was about two-thirds down the second page and was signaled by the word “ARBITRATION” in all capital letters, but not set off by a section break. *Id.* In the 2006 version, the arbitration provision was set off by a section break and the boldface heading, “ARBITRATION.” Bennett Decl., Ex. B at 34.

*8 In each version of the agreement, there is a notice near the beginning of the agreement: “This agreement requires the use of arbitration to resolve disputes and ... limits the remedies available to you in the event of a dispute.” *See* Bennett Decl., Ex. A at 10, Ex. B at 31; Crosetto Decl. at 22.

However, in none of the versions is this notice in “the very first sentence of the Agreement” as Cingular claims. *See* Def.’s Reply at 7. In the online version, the customer has to scroll down in order to see this notice. Crosetto Decl. at 17. In the version the customer can print out at home, it begins in the tenth line of the text. In the 2004 Welcome Kit, it is the third line (fourth sentence) of the agreement. In the 2006 Welcome Kit, it appears on the bottom half of a page; the top half is labeled “Wireless Service Agreement,” and the bottom half begins the four-page “Wireless Terms of Service.”

Cingular contends that “Washington courts have not found procedural unconscionability when arbitration agreements are far less conspicuous than Cingular’s.” Def.’s Reply at 8. The Court finds this statement unfounded, because Cingular relies on two cases where the arbitration was decidedly more conspicuous than in the present case. In *Adler v. Fred Lind Manor*, 153 Wn.2d 331 (2004) the court held that the important terms of an arbitration agreement were not hidden in a maze of fine print, where the agreement was a short, half-page agreement, which was clearly labeled “**Arbitration Agreement**” in

“boldface type and normal font,” and the first sentence of the agreement stated that arbitration would be the exclusive dispute resolution mechanism. 153 Wn.2d at 349-50. The arbitration provision in *Adler* was more conspicuous than the one at issue here, which is buried in the middle of a four page block of text ^{FN8} and is not mentioned in the first sentence of the agreement. Similarly, in *Lowden v. T-Mobile*, 2006 WL 1009279 (April 13, 2006), Judge Pechman of this District held that an arbitration agreement was not procedurally unconscionable, where “the typeface [was] relatively small, [but the] arbitration provisions [were] not hidden in a ‘maze of fine print.’” “In *Lowden*, however, the provisions were “clearly labeled ‘Mandatory Arbitration’” and referenced just above the signature line. 2006 WL 1009279 at *4. In the present case, the word “ARBITRATION” is in all capital letters, but it is in the middle of the text and not clearly noticeable. There is no notice of mandatory arbitration visible near the box the customer checks to indicate “I agree,” which is the online equivalent to a signature line. Therefore, the Court concludes that *Adler* and *Lowden* do not prevent this Court from finding Cingular’s agreement procedurally unconscionable.

FN8. The Court notes that in the last version Mr. Riensche received, with his 2006 Welcome Kit, the arbitration provision is set apart by a section break. *See* Bennett Decl. at 34.

However, under Washington law the use of small print in a standard form agreement does not necessarily render it procedurally unconscionable, even where the provision is not set apart by section breaks. *See Planet Ins. Co. v. Wong*, 74 Wn.App. 905, 915 (1994) (the use of small print on back of standard form did not render provision unconscionable, where there were no section breaks and provision began with a heading in all capital letters). *See also PEMCO v. Hertz Corp.*, 59 Wn.App. 641, 642 (1990) (the use of small, but not fine, print does not render agreement unconscionable). The fact that the arbitration provision begins with the word “ARBITRATION” in capital letters militates against finding procedural unconscionability. Furthermore, Mr. Riensche had a heightened awareness of the possibility of arbitration agreements in wireless telephone contracts, based on his previous lawsuit against AT & T. *See Schnall v. AT & T Wireless Services, Inc.*, KCSC No. 02-2-05776-4 (August 15, 2003), Noonan Decl., docket

no. 7, Ex. D.

d. Conclusions Regarding Procedural Unconscionability

*9 Having considered all the circumstances surrounding the transaction, the Court concludes that Mr. Riensche had a meaningful choice. Although the provision was a standard form agreement in small print, several factors militate against procedural unconscionability: the arbitration provision was mentioned early in the agreement; the provision began with the word "ARBITRATION" in all capital letters; Mr. Riensche was presented with the terms prior to completing his online transactions; he received a printed copy with his 2004 and 2006 Welcome Kits, and was given the option to cancel without a termination fee within several days of receiving it; the 2006 Welcome Kit contained a copy of the agreement with the arbitration provision set off by a section break; and Mr. Riensche had a heightened awareness of the possibility of arbitration. Therefore, the arbitration agreement is not unenforceable on the basis of procedural unconscionability.

2) Substantive Unconscionability

"Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh...." Adler, 153 Wn.2d at 344 (quoting Schroeder, 86 Wn.2d at 260). "'Shocking to the conscience,' 'monstrously harsh,' and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Id.* (quoting Nelson, 127 Wn.2d at 131). See also Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 303 (2004).

Mr. Riensche contends that the arbitration provision is substantively unconscionable because it (1) mandates the use of AAA rules that bar discovery; (2) mandates fee and cost sharing if the arbitrator finds the consumer's claim "improper or unwarranted;" (3) bars a prevailing consumer from receiving an award of fees and costs, if the award is less than the demand; (4) allows Cingular to unilaterally change the terms of the agreement; (5) prohibits class or representative proceedings; and (6) limits remedies available to consumers.

a. Discovery Under the AAA Rules

The arbitration agreement provides, that "arbitration shall be governed by the Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules")." Crosetto Decl. at 24. The AAA Rules do not bar discovery, as Mr. Riensche contends. To the contrary, the AAA Rules provide for hearings, exchange of documents, and presentation of evidence. Supp. Noonan Decl., docket no. 16, ¶ 4, Ex. C at 28, ¶ C-6; Ex. D at 45-46. Disputes under \$10,000 "shall be resolved by submission of documents, *unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary.*" *Id.* at 45 (emphasis added). Under the AAA Rules, the arbitrator may direct parties to produce documents and to identify witnesses. *Id.* at 40.

In Lowden v. T-Mobile, Judge Pechman rejected the argument that the potential limitation of discovery by an arbitrator is a basis for substantive unconscionability. See Lowden, 2006 WL 1009279 at *8-9. The Washington Supreme Court in Zuver held that "the effect of the attorney fees provision ... [was] purely speculative," because the court could not speculate upon how the arbitrator would interpret the provision, thus it was not substantively unconscionable. Zuver, 153 Wn.2d at 311-12 (citing PacificCare Health Systems, 538 U.S. 401, 406-407 (2003)). Likewise, this Court may not speculate as to whether an arbitrator would limit discovery in a dispute between Cingular and Mr. Riensche. Therefore, the provision regarding use of the AAA Rules is not substantively unconscionable.

b. Fee and Cost Sharing

*10 The arbitration agreement provides that, [e]xcept as otherwise provided herein, Cingular will pay all AAA filing, administration and arbitrator fees for any arbitration initiated in accordance with the notice requirements above. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is improper or not warranted, as measured by the standards set forth in Federal Rule of Civil Procedure 11(b), then the payment of all such fees shall be governed by the AAA Rules. In such case, you agree to reimburse Cingular for all monies previously dispersed by it that are otherwise your obligation to pay under the AAA Rules.

Mr. Riensche contends that this provision is

substantively unconscionable, because it “requires that the consumer agree to pay the fees and costs in such circumstances,” rather than leaving the allocation of fees and costs to the court. Pl.’s Resp. at 4.

However, this provision does not require a consumer to pay Cingular’s attorneys’ fees and costs. Rather, it provides that Mr. Riensche will have to reimburse Cingular for the fees it has paid on his behalf, if the arbitrator finds that his claim violates Fed.R.Civ.P. 11(b). The amount of these fees is governed by the consumer fee schedule in the AAA Rules.

For claims less than \$10,000, the AAA Rules provide that the consumer’s share of the fees may not exceed \$125. *See* Supp. Noonan Decl. ¶ 4, Ex. C at 29. However, “if the consumer’s claim or counterclaim is non-monetary, then the consumer must pay an Administrative Fee in accordance with the Commercial Fee Schedule.” *Id.* The consumer must also deposit one-half of the arbitrator’s compensation,” any unused portion of which is refunded. *Id.* The Commercial Fee Schedule requires an initial filing fee of \$3,250 for each claim or counterclaim filed, and a case service fee of \$1,250 for each case that proceeds to its first hearing. *Id.* Ex. D at 49. These fees are in addition to arbitrator compensation. *Id.* Therefore, if the claim or demand violates Fed.R.Civ.P. 11(b), and the consumer has requested an injunction, the consumer would be liable for a minimum of \$3,250 plus half of the actual cost of arbitrator compensation.^{FN9}

^{FN9} Cingular erroneously claims that “the most that a consumer ever must pay under the AAA Rules” is \$125. Def.’s Reply at 11. This is only true for *monetary* claims that do not exceed \$10,000.

Mr. Riensche contends that this provision violates Fed.R.Civ.P. 11(c), because the arbitrator does not have discretion to require the consumer to pay the fees or not. Pl.’s Resp. at 4 n. 7. Fed.R.Civ.P. 11(c) provides that “the court may ... impose an appropriate sanction” upon parties who have violated Rule 11(b). However, the requirement that a consumer who has violated Fed.R.Civ.P. 11(b) pay his own fees according to the AAA Rules is not equivalent to sanctions under Fed.R.Civ.P. 11(c), because the provision merely negates the preceding provision, in which Cingular agrees to pay the consumer’s fees in cases where the claim or demand is frivolous. Therefore, the provision requiring consumers who

violate Fed.R.Civ.P. 11(b) to pay their own arbitration fees is not substantively unconscionable.

c. Attorneys’ Fees

*11 Cingular’s agreement provides that “[i]f the arbitrator grants relief to you that is equal or greater than the value of your Demand, Cingular shall reimburse you for your reasonable attorneys’ fees and expenses incurred for the arbitration.” Mr. Riensche contends that this provision is substantively unconscionable because it prohibits an arbitrator from awarding attorneys’ fees if the award is even five dollars less than the demand. Cingular contends that this provision “does not preclude an arbitrator from awarding the same relief that a court could award,” even if the award was less than the demand. Def.’s Reply at 10. While Cingular is correct that the language of the provision does not expressly bar such an award, the language is unclear and invites interpretations such as Mr. Riensche’s. Nonetheless, this provision is ambiguous. Therefore, because the Court may not speculate that an arbitrator will interpret this provision “in a manner that casts [its] enforceability into doubt,” *Zuver*, 153 Wn.2d at 311 (quoting *PacifiCare Health Systems*, 538 U.S. 401, 406-407 (2003)), this provision is not substantively unconscionable.

d. Cingular’s Right to Change the Agreement

Mr. Riensche contends that the agreement is unenforceable because Cingular reserves the right to unilaterally change the terms of the agreement. However, the agreement provides “that if Cingular makes any change to this arbitration provision ... you may reject any such change and require Cingular to adhere to the language in this provision.” Crosetto Decl. at 24. Therefore, this provision does not render the agreement illusory or substantively unconscionable.

e. Class Action Prohibition

Mr. Riensche contends that Cingular’s arbitration agreement is substantively unconscionable because it prohibits all class proceedings. The agreement provides that the consumer and Cingular agree to bring individual claims only, “and not as a plaintiff or class member in any purported class or representative proceeding.” Two recent decisions in this district support Mr. Riensche’s contention.

In *Luna v. Household Finance Corp.* III, 236 F.Supp.2d 1166, Judge Lasnik held that an arbitration clause prohibiting class actions was substantively unconscionable because it was being used “as a sword to strike down access to justice instead of a shield against prohibitive costs.” 236 F.Supp.2d at 1179 (quoting *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 465 (2002)). Following the reasoning of *Luna*, Judge Pechman held that class action prohibitions in two wireless telephone contracts were substantively unconscionable, because the prohibitions “deprive[d] Plaintiffs of the means to effectively vindicate their rights under the CPA,” and the provisions were “effectively one-sided because there is no conceivable set of facts under which T-Mobile would bring a class action against its consumers.” ^{FN10} *Lowden v. T-Mobile*, 2006 WL 1009279 at *6.

^{FN10} Cingular argues that *Lowden* was incorrectly decided, because it was “based on the ‘consumer’ nature of the claims at issue and the fact that ‘an individual consumer has so little at stake that she is unlikely to pursue her claim.’” “Def.’s Mot. to Compel at 12 (quoting *Lowden*, 2006 WL 1009279 at *6). As discussed previously, the consumer nature of the claims is merely one fact in the Court’s consideration of the totality of the circumstances, and the FAA does not preempt a ruling that takes this fact into account.

*12 Cingular argues that a waiver of class action remedies in an arbitration agreement does not render the contract unconscionable. Indeed, some Washington courts have enforced arbitration provisions that prevent class relief. See, e.g., *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wn.App. 438, 447 (2003); *Stein v. Geonerco, Inc.*, 105 Wn.App. 41, 49 n. 1 (2001) (citing *Garmo v. Dean. Witter. Reynolds, Inc.*, 101 Wn.2d 585, 590 (1984)). However, as Judge Pechman noted in *Lowden*, “neither *Heaphy* nor *Stein* addressed the unconscionability of class action prohibitions, but instead rested their holdings on the plaintiffs’ failures to ‘demonstrate a conflict with statutory provisions, contract law, or due process requirements.’” “2006 WL 1009279 at *6 (citing *Heaphy*, 117 Wn.App. at 447; *Stein*, 105 Wn.App. at 50).

Here, as in *Luna* and *Lowden*, the class action prohibition is a one-sided provision that only benefits

Cingular. The class action prohibition effectively prevents consumers from seeking redress whenever the monetary value of the claim is so small that it is not worth the time or money to pursue in small claims court or arbitration, while allowing Cingular to allegedly “cheat large numbers of consumers out of individually small sums of money.” See *Discover Bank v. Superior Court*, 30 Cal.Rptr.3d 76, 87 (2005). Even though Cingular agrees to pay the fees and costs of arbitration, the class action prohibition “serves as a disincentive ... to avoid the type of conduct that might lead to class action litigation.” *Id.* at 84. This contravenes Washington public policy favoring the availability of class actions as a mechanism for enforcing the CPA. See *Dix v. ICT Group, Inc.*, 125 Wn.App. 929 (2005) (holding that a forum selection clause requiring consumers to litigate in a forum that prohibited class actions was unenforceable).

Cingular correctly notes that mutuality of obligation in a contract does not require both parties to have identical requirements. *Zuver*, 153 Wn.2d at 317. However, *Zuver* held that a remedies limitation provision was substantively unconscionable, because it was unilateral; it only applied to *Zuver*. *Id.* at 318-19. Specifically, it “blatantly and excessively favor[ed] the employer in that it allow[ed] the employer alone access to a significant legal recourse.” *Id.* See also *Adler*, 153 Wn.2d at 357-58 (holding that a 180-day limitations provision in an employment arbitration agreement was substantively unconscionable because it unreasonably favored employer). Here, the class action prohibition does not affect Cingular, because there is no circumstance under which Cingular would bring a class action against consumers. But it deprives consumers of an important means for enforcing their rights under the CPA. The class action prohibition is unilateral and excessively favors Cingular, and is therefore substantively unconscionable.

f. Limitation of Remedies

*13 Mr. Riensche contends that the arbitration agreement is substantively unconscionable because it limits remedies available to consumers under the CPA. The CPA provides that any person who is injured ... by a violation of [the CPA] may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney’s fee, and the court may in its discretion,

increase the award of damages to an amount not to exceed three times than actual damages sustained....

The agreement provides that "[t]he arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." Crosetto Decl. at 24. This limitation is substantively unconscionable for the same reasons that the class action prohibition is unconscionable. The limitation on injunctive relief is one-sided and overly harsh to consumers, because it limits a remedy available to consumers under the CPA, which Cingular would never seek. In the event that an arbitrator found that Cingular violated the rights of an individual consumer under the CPA, the arbitrator would be barred from enjoining Cingular from continuing the violative practice as to other consumers. The Court concludes that the limitation excessively favors Cingular and is therefore substantively unconscionable.^{FN11}

^{FN11} Mr. Riensche also contends that the agreement prohibits an award of treble damages. In each instance where Mr. Riensche claims that the agreement bars treble damages, he does not specify what language in the agreement prohibits treble damages. *See* Pl.'s Resp. at 4, 9, 19. Cingular contends that the agreement does not prohibit an arbitrator from awarding treble damages. The agreement does not expressly prohibit treble damages. If an arbitrator were to interpret the agreement as barring treble damages, it would be unconscionable for the same reasons the general injunction is unconscionable. However, because the agreement is ambiguous, the Court may not speculate that an arbitrator will interpret this provision "in a manner that casts [its] enforceability into doubt," *Zuver*, 153 Wn.2d at 311 (quoting *PacifiCare Health Systems*, 538 U.S. 401, 406-407 (2003)).

F. Severability

"Courts are generally loathe to upset the terms of an agreement and strive to give effect to the intent of the parties." *Zuver*, 153 Wn.2d at 320 (citing *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674 (1996)). The arbitration agreement provides that if the class action prohibition "is found to be unenforceable, then the entirety of

this arbitration clause shall be null and void." Because this Court concludes that the class action provision is substantively unconscionable, the Court also concludes that the arbitration clause in this agreement is null and void.

G. Stay of Proceedings

The question whether Cingular's class-arbitration waiver is unconscionable, and therefore unenforceable, under Washington law is currently pending before the Washington Supreme Court in *Scott v. Cingular Wireless, LLC*, No. 77406-4. The Court declines to stay this action pending the *Scott* decision. If *Scott* holds that the class action waiver in Cingular's arbitration agreement is enforceable, this Court can reconsider its ruling.

Conclusion

Mr. Riensche is bound by the service agreements to which he agreed in online transactions in 2004 and 2006. Cingular did not waive its right to compel arbitration by removing this case to federal court. The ruling by a California court that an arbitration agreement materially identical to that at issue here was unenforceable does not render the agreement between Mr. Riensche and Cingular null and void, and Cingular is not collaterally estopped from litigating the enforceability of the agreement. The FAA does not preempt a finding of substantive unconscionability under general doctrines of state contract law. The arbitration agreement is not procedurally unconscionable, because Mr. Riensche had a meaningful choice whether to enter into the transactions. However, the class action prohibition and limitation on the availability of a general injunction are substantively unconscionable under Washington law. Defendant Cingular's Motion to Compel Arbitration, docket no. 5, is DENIED.

***14 IT IS SO ORDERED.**

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